

## Internal Revenue Service

Number: **200717016**

Release Date: 4/27/2007

Index Number: 2519.00-00, 2044.00-00,  
2511.06-00, 2702.00-00,  
2036.00-00, 2037.01-00,  
2038.00-00

Department of the Treasury  
Washington, DC 20224

Third Party Communication: None  
Date of Communication: Not Applicable

Person To Contact: \_\_\_\_\_, ID No. \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Refer Reply To:  
CC:PSI:B04  
PLR-153161-05

Date: DECEMBER 19, 2006  
,

Re:

Legend:

Decedent	=
Spouse	=
Child 1	=
Child 2	=
Child Trust B1	=
Child Trust B2	=
Date 1	=
Date 2	=
Trust	=
QTIP Trust	=

Bank	=
State	=
Court	=
State Statute	=
Case	=

Dear \_\_\_\_\_ :

This is in response to your letter requesting rulings regarding the gift and estate tax consequences of a proposed transaction.

The facts submitted and representations made are as follows. Decedent died testate on Date 1. Decedent was survived by Spouse, Child 1 and Child 2. Child 1 and Child 2 are each under age 30. Decedent bequeathed the residue of his estate to Trust.

Article III of Trust provides that upon Decedent's death, the Trust residuary shall be divided into two shares, a Non-Marital Trust and QTIP Trust.

Article V provides that all of the net income of QTIP Trust is to be distributed at least annually to Spouse for the life of Spouse. The trustee may distribute principal to Spouse in such amounts as the trustee, in such trustee's discretion, may determine. Upon Spouse's death, if Decedent's children have not attained the age of thirty, then one equal share of QTIP Trust will be placed in a separate trust for each child of Decedent then living and children of Decedent then deceased with issue then living.

The terms of each child's trust are set forth in Article VI, which provides that, prior to a child attaining age twenty-five, the trustee is authorized to pay net income and/or principal to the child, in the trustee's discretion. At the time the child attains the age of twenty-five, the trustee is to pay all net income to the child and may pay principal to the child, in the trustee's discretion. When the child attains age thirty, one-half of the principal and undistributed income is to be distributed to the child. When the child attains age thirty-five, the remaining principal is to be paid to the child. If the child dies prior to age thirty-five leaving issue, then the remaining principal and any undistributed income will be paid as the child directs in the child's will, and in the absence of any direction in the child's will, to the child's issue, if any. If any surviving issue of child have not attained the age of twenty-one, such issue's share will be held in trust until such issue attains the age of twenty-one. If such issue dies prior to attaining the age of twenty-one, the trust property will be distributed to the issue of such deceased issue, if any, or to the other issue of the deceased child. If there are no issue of deceased child, the trust property will be distributed to the Decedent's issue then living. If none of Decedent's issue are then living, the trust property will be distributed to the then living heirs of Decedent under the laws of intestacy of State. If a child dies prior to attaining age thirty-five, leaving no issue, the trust principal and undistributed income will be paid as the child directs in the child's will, and in the absence of such direction, to Decedent's issue, per stirpes. If the child dies without issue and does not direct distribution by will, then the trust property will be distributed to the Decedent's issue, per stirpes. If the child dies prior to attaining age thirty-five without leaving issue, and without directing distribution by will, and there are no issue of Decedent, the remaining trust principal and undistributed income will be distributed to Decedent's then living heirs at law, determined under the laws of intestacy of State.

On Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, an election was made to treat QTIP Trust as a qualified terminable interest property (QTIP) trust pursuant to § 2056(b)(7)(B)(v) of the Internal

Revenue Code. The return was examined by the Service and a closing letter was issued on Date 2.

The current trustees of QTIP Trust are Bank, Spouse, and two other individuals. The trustees petitioned Court for an order approving the following amendments to QTIP Trust: (i) QTIP Trust may be divided into two separate identical trusts, QTIP Trust A and QTIP Trust B, each of which will have substantially the same terms and provisions as QTIP Trust and each trust will be funded on a pro-rata or non-pro-rata basis; (ii) QTIP Trust B may be divided into separate trusts for the children of Decedent (Child Trust B1 and Child Trust B2) upon the death of Spouse or disclaimer of Spouse of her interest in QTIP Trust B; and (iii) Bank or its successors shall be the sole trustee of Child Trust B1 and Child Trust B2. Spouse will renounce her right to receive trust income and discretionary distributions of trust corpus from QTIP Trust B and Child Trust B1 and Child Trust B2. Spouse and the remainder beneficiaries of QTIP Trust have consented to the proposed amendments.

You have requested the following rulings:

1. The proposed division of QTIP Trust into QTIP Trust A and QTIP Trust B, the funding of such trusts on a non-pro-rata basis, and the renunciation by Spouse of her entire interest in QTIP Trust B, Child Trust B1, and Child Trust B2 will not invalidate the QTIP election that was made with respect to the QTIP Trust or the status of QTIP Trust A and QTIP Trust B as QTIP trusts.
2. If Spouse renounces her qualifying income interest in QTIP Trust B, pursuant to § 2519, Spouse will be deemed to have made a transfer of all of QTIP Trust B's property other than her qualifying income interest.
3. If Spouse renounces her entire interest in QTIP Trust B, no part of that trust's property deemed transferred under § 2519 will be included in Spouse's gross estate pursuant to § 2044(b)(2).
4. If Spouse renounces her entire interest in QTIP Trust B, such renunciation will not result in a transfer under § 2519 of any of the assets of QTIP Trust A.
5. If Spouse renounces her entire interest in QTIP Trust B, Spouse's interest in QTIP Trust A will not be valued at zero pursuant to § 2702.
6. If Spouse renounces her entire interest in QTIP Trust B, Spouse will be treated as making a transfer under §§ 2519 and 2511 of the entire value of QTIP Trust B, for which the credit against the tax imposed by § 2501 shall be allowed under § 2505.

7. If Spouse renounces her entire interest in QTIP Trust B, Spouse will be personally liable for all gift tax attributable to the transferred property, except that if Spouse exercises her right to recover gift taxes paid that are attributable to the transferred property pursuant to § 2207A(b), Spouse will have made a net gift.
8. If Spouse renounces her entire interest in QTIP Trust B, Child Trust B1, and Child Trust B2, none of the property in those trusts will be includible in Spouse's gross estate under §§ 2036, 2037 or 2038.

#### RULINGS 1 – 7:

Section 2056(b)(7) allows an estate tax marital deduction for qualified terminable interest property. Under § 2056(b)(7)(B)(i), the term qualified terminable interest property means property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which the QTIP election under § 2056(b)(7)(B)(v) applies. Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, and no person has a power to appoint any part of the property to any person other than the surviving spouse during the surviving spouse's life.

Section 2044(a) provides that the value of the gross estate shall include the value of any property in which the decedent had a qualifying income interest for life. Section 2044(b)(2) provides that paragraph (a) applies to any property if § 2519 did not apply with respect to a disposition by the decedent of part or all of such property.

Section 2501 imposes a tax on the transfer of property by gift by an individual. Section 2502(c) provides that the payment of the gift tax is the liability of the donor. Section 2511 provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Section 2512(b) provides that, where property is transferred for less than an adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the value of the consideration is deemed a gift.

Section 2505(a), as effective for gifts made after December 31, 2001, but before December 31, 2009, provides that in the case of a citizen or resident of the United States, there shall be allowed as a credit against the tax imposed by § 2501 for each calendar year an amount equal to—

- (1) the applicable credit amount in effect under § 2010(c) for such calendar year (determined as if the applicable exclusion amount were \$ 1,000,000) reduced by
- (2) the sum of the amounts allowable as a credit to the individual under § 2505 for all preceding calendar periods.

Section 2519(a) provides that any disposition of all or part of a qualifying income interest for life in any property to which this section applies is treated as a transfer of all interests in the property other than the qualifying income interest. Section 2519(b) provides that paragraph (a) applies to any property if a deduction was allowed with respect to the transfer of such property to the donor under § 2056(b)(7).

For gift tax purposes, § 2207A(b) provides that, if for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under § 2519, such person shall be entitled to recover from the person receiving the property the amount by which (1) the total tax for such year under chapter 12 exceeds (2) the total tax which would have been payable under such chapter for such year if the value of such property had not been taken into account for purposes of chapter 12.

Section 25.2519-1(a) of the Gift Tax Regulations provides that a transfer of all or a portion of the income interest of the spouse in QTIP property is a transfer by the spouse under § 2511. Section 25.2519-1(c) provides that the amount treated as a transfer under § 2519 upon a disposition of all or part of a qualifying income interest for life in QTIP property is equal to the fair market value of the entire property subject to the qualifying income interest, determined on the date of the disposition (including any accumulated income and not reduced by any amount excluded from total gifts under §2503(b) with respect to the transfer creating the interest), less the value of the qualifying income interest in the property on the date of the disposition. The gift tax consequences of the disposition of the qualifying income interest are determined separately under § 25.2511-2.

Section 25.2511-2(a) provides that the gift tax is a primary and personal liability of the donor, is an excise upon the donor's act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

Rev. Rul. 75-72, 1975-1 C.B. 310, holds that gift tax imposed on a transfer that is paid by the donee may be deducted from the value of the transferred property in determining the amount of the gift, if it is established that the payment of the tax by the donee or from the property itself is a condition of the transfer. If, at the time of the transfer, the gift is made subject to a condition that the gift tax is to be paid by the donee or out of the transferred property, then the donor receives consideration for the transfer in the amount of the gift tax to be paid by the donee. Thus, under § 2512(b), the value of the gift is measured by the fair market value of the property passing from the donor minus the amount of the gift tax to be paid by the donee.

Rev. Rul. 81-223, 1981-2 C.B. 189, holds that, in determining the amount of the gift tax liability that is to be subtracted from the value of the transferred property, the donor's available unified credit must be used to reduce the gift tax liability that the donee has assumed to the extent the unified credit is available.

Although § 2502(c) provides that the tax on the gift is the liability of the donor, in Rev. Rul. 75-72 and Rev. Rul. 81- 223 the burden of the tax was shifted to the donees

by agreement. The amount of the gift on which the gift tax was computed was reduced by the amount of gift tax paid by the donee.

As discussed above, with respect to the gift tax imposed as a result of a transfer under § 2519, § 2207A(b) statutorily shifts the burden, but not the liability, for paying the gift tax to the donee. In reimbursing the donor for the gift tax paid pursuant to the statute, the donee provides consideration for the gift. The donee's payment inures to the benefit of the donor because it reimburses the donor for gift tax that the donor was liable for and would otherwise be required to pay out of the donor's own funds. See Rev. Rul. 75-72. Accordingly, net gift treatment of a transfer under § 2519 is implicit under § 2207A(b).

Section 2702 provides special valuation rules in the case of transfers of interests in trusts. Under § 2702(a), whether a transfer of an interest in trust to (or for the benefit of) a member of the transferor's family is a gift (and the value of such transfer), the value of any interest in such trust retained by the transferor or any applicable family member shall be determined as provided in paragraph (a)(2). Paragraph (a)(2) provides that the value of any retained interest that is not a qualified interest shall be treated as being zero. The value of any retained interest that is a qualified interest is determined under § 7520.

State statute provides that the district court shall have jurisdiction to construe the provisions of any trust instrument to determine the law applicable thereto, the powers, duties and liability of the trustee, and the existence or nonexistence of facts affecting administration of the trust estate. The district court has authority with consent of all interested parties to assume power over a trust and direct that it be modified, terminated or distributed. See Case.

Accordingly, we rule as follows:

1. The proposed division of QTIP Trust into QTIP Trust A and QTIP Trust B, the funding of such trusts on a non-pro-rata basis, and the renunciation by Spouse of her entire interest in QTIP Trust B, Child Trust B1 and Child Trust B2 will not invalidate the QTIP election that was made with respect to QTIP Trust or the status of QTIP Trust A and QTIP Trust B as QTIP trusts.
2. If Spouse renounces her qualified income interest in QTIP Trust B, pursuant to § 2519, Spouse will be deemed to have also made a transfer of all of QTIP Trust B's property other than her income interest.
3. If Spouse renounces her entire interest in QTIP Trust B, no part of the trust's property deemed transferred under § 2519 will be included in Spouse's gross estate pursuant to § 2044(b)(2).
4. If Spouse renounces her entire interest in QTIP Trust B, such renunciation will not result in a transfer under § 2519 of any of the assets of QTIP Trust A.

5. If Spouse renounces her entire interest in QTIP Trust B, Spouse's interest in QTIP Trust A will not be valued at zero pursuant to § 2702.
6. If Spouse renounces her entire interest in QTIP Trust B, Spouse will be treated as making a transfer under §§ 2519 and 2511 of the entire value of QTIP Trust B, for which the credit against the tax imposed by § 2501 shall be allowed under § 2505.
7. If Spouse renounces her entire interest in QTIP Trust B, Spouse will be personally liable for all gift tax attributable to the transferred property, except that if Spouse exercises her right to recover gift taxes paid that are attributable to the transferred property pursuant to § 2207A(b), Spouse will have made a net gift.

#### RULING 8:

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death -- (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2037 provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if -- (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

Section 2038(a)(1) provides that the value of the decedent's gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what

source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period on the date of the decedent's death.

In this case, Spouse will renounce her right to receive trust income and discretionary distributions of trust corpus from QTIP Trust B, Child Trust B1, and Child Trust B2.

Consequently, we rule as follows:

8. If Spouse renounces her entire interest in QTIP Trust B, Child Trust B1, and Child Trust B2, none of the property in those trusts will be includible in Spouse's gross estate under §§ 2036, 2037 or 2038.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Pursuant to the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Lorraine E. Gardner  
Senior Counsel, Branch 4  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure  
Copy for 6110 purposes